



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2004

Mr. Bret Jimerson
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
306 West 7th Street, Suite 1045
Fort Worth, Texas 76102

OR2004-9986A

Dear Mr. Jimerson:

This office issued Open Records Letter No. 2004-9986 (2004) on November 23, 2004. We have examined the ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on September 29, 2004. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213706.

The De Leon Independent School District (the "district"), which you represent, received a request for attorney fee bills dated August 1, 2004 and September 1, 2004; a specified list of persons; an endorsement adding a specified property to the district's insurance policy; and a specified lease. You state that, with the exception of the requested attorney fee bills, the district has released the responsive information to the requestor. You have advised this office that the requested September 1, 2004 fee bill did not exist at the time the district received the present request. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266

(Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that the submitted August 1, 2004 attorney fee bill information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

We first note that the submitted information is subject to section 552.022 of the Government Code. This section provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

. . . .

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16).¹ Because the submitted information consists of the district's attorney fee bills, the district must release this information under section 552.022(a)(16) unless it is expressly confidential under other law.

The district seeks to withhold the submitted attorney fee bill under sections 552.103 and 552.107. We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103

¹ You acknowledge that section 552.022(a)(16) is applicable in this situation, although you appear to raise section 552.022(a)(16) as an exception to disclosure in conjunction with the attorney-client privilege. We note that section 552.022 is not itself an exception to disclosure under the Public Information Act (the "Act"), but rather provides a list of eighteen categories of information that are expressly public and may not be withheld unless confidential under other law. Thus, section 552.022 does not provide a basis for withholding information from disclosure. See Gov't Code § 552.301(a) (noting that exceptions to disclosure under Act are found at subchapter C of chapter 552 of Government Code). However, we will address your claim under the attorney-client privilege pursuant to Rule 503 of the Texas Rules of Evidence. See Open Records Decision No. 676 at 5 (2002) (discussing applicability of attorney-client privilege to information subject to section 552.022, including attorney fee bills).

and 552.107 do not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any portion of the submitted attorney fee bills under section 552.103 of section 552.107. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Rule 503 of the Texas Rules of Evidence. Accordingly, we will also consider your attorney-client privilege claim under Rule 503.

Rule 503 provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged

and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You indicate that the submitted fee bill includes confidential communications between representatives of the district and its attorneys. Based on your representations and our review of the submitted information, we agree that the attorney fee bill at issue contains information that is protected by the attorney-client privilege. We have marked the information the district may withhold pursuant to Rule 503 of the Texas Rules of Evidence. We conclude, however, that the remainder of the information in the submitted attorney fee bills is not protected by the attorney-client privilege and must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long, sweeping horizontal line extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 213706

c: Mr. Roy Johnson
P.O. Box 52
Desdemona, Texas 76445